WEST VIRGINIA LEGISLATURE
REGULAR SESSION, 1997

ENROLLED
Committee Substitute for
SENATE BILL NO. 349
(Originating in the Committee on Health
(By Senator AND HUMAN RESOURCES)

PASSED APRIL 10, 1997
In Effect NINETY DAYS FROM Passage
AN ACT to amend chapter sixteen of the code of West Virginia, one thousand nine hundred thirty-one, as amended, by adding thereto a new article, designated article five-n, relating to establishing a new licensure category for residential care communities; stating public policy; defining terms; setting forth powers and duties of the director of the division of health with regard to residential care communities; providing for administrative and inspection staff; authorizing and directing proposal of legislative rules; establishing minimum standards for residential care communities; requiring a license for operation; providing for application procedures and fees;
providing for license expiration, renewal, revocation, suspension and limitation; requiring cost disclosure to potential residents; limiting liability for costs not disclosed; prohibiting management of residents' personal funds; requiring compliance with fire code; setting forth provisions for inspections; prohibiting retaliation; requiring reports and plans of correction; classifying types of violations; providing for notice of violation or noncompliance; authorizing assessment of civil penalties, interest, attorneys fees and costs; providing for hearings of contested cases; providing for administrative appeals; providing for judicial review; providing for collection of unpaid penalties; authorizing judicial appointment of temporary management and specifying scope of authority; providing for automatic stay of certain actions; authorizing certain emergency rules; providing for legal counsel to the director; specifying unlawful acts; authorizing injunctive relief and private causes of action; setting forth damages which may be recovered; requiring that certain reports and records be made available; and providing for confidentiality of residents' records.

Be it enacted by the Legislature of West Virginia:

That chapter sixteen of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended by adding thereto a new article, designated article five-n, to read as follows:

ARTICLE 5N. RESIDENTIAL CARE COMMUNITIES.

§16-5N-1. Purpose.

1 It is the policy of this state to encourage and promote
2 the development and utilization of quality residential
3 communities for persons who desire to live independently
4 in an apartment, who are or may be dependent upon the
5 services of others by reason of physical or mental impair-
6 ment, and who may require limited and intermittent
7 nursing care and who are capable of self-preservation and
8 are not bedfast. Individuals may not be disqualified for
9 residency solely because they qualify for or receive
10 services coordinated by a licensed hospice. This care and
11 treatment requires a living environment for these persons
which, to the extent practicable, approximates a normal
home environment. To this end, it is the policy of this
state to encourage and promote the development and
maintenance of residential care communities.

The provisions of this article are remedial and shall be
liberally construed to effectuate its purposes and intents.
This article is intended to apply only to residential
communities in which apartments are rented on a month-
to-month basis. All residential care community rental
contracts shall specify in bold-faced type, under the
conspicuous caption "NOTICE TO RESIDENT", that
residents of the residential community must be capable of
self-preservation, or substantially similar words clearly
conveying the same meaning. This article may not be
construed to require that any person be required to vacate
any property in which that person has an ownership or a
leasehold interest, except for a month-to-month tenancy,
because that person is disabled and incapable of self-
preservation. Nothing in this article is intended to
supersede the provisions of article eleven-a, chapter five
of this code.

§16-5N-2. Definitions.

As used in this article, unless a different meaning
appears from the context:

(a) "Capable of self-preservation" means that a person
is, at a minimum, physically capable of removing himself
or herself from situations involving imminent danger such
as fire;

(b) “Deficiency” means a statement of the rule and the
fact that compliance has not been established and the
reasons therefor;

(c) "Department” means the state department of health
and human resources;

(d) “Director” means the director of the division of
health;

(e) “Division” means the division of health of the state
department of health and human resources;
(f) "Limited and intermittent nursing care" means direct hands-on nursing care of a resident who needs no more than two hours of nursing care per day for a period of time no longer than ninety consecutive days per episode, which care may be provided only when the need for it meets these requirements: (1) The resident requests that he or she remain in the residential care community; (2) the resident is advised of the availability of other specialized health care facilities to treat his or her condition; and (3) the need for care results from a medical pathology or the normal aging process. Limited and intermittent nursing care may be provided only by or under the supervision of a registered professional nurse and in accordance with legislative rules proposed by the secretary;

(g) "Nursing care" means those procedures commonly employed in providing for the physical, emotional and rehabilitation needs of the ill or otherwise incapacitated and which require technical skills and knowledge beyond those that untrained persons possess, including, irrigations, catheterizations, special procedures that contribute to rehabilitation and administration of medication by any method involving a level of complexity and skill not possessed by untrained persons;

(h) "Person" means a natural person and every form of organization, whether incorporated or unincorporated, including partnerships, corporations, trusts, associations and political subdivisions of the state;

(i) "Personal assistance" means services of a personal nature, including help in walking, bathing, dressing, toileting, getting in or out of bed and supervision that is required because of the age or mental impairment of a resident;

(j) "Resident" means an individual who lives in a residential care community for the purpose of receiving personal assistance or limited and intermittent nursing services from the community;

(k) "Residential care community" means any group of seventeen or more residential apartments, however named, which are part of a larger independent living community
and which are advertised, offered, maintained or operated
by an owner or manager, regardless of consideration or
the absence thereof, for the express or implied purpose of
providing residential accommodations, personal assistance
and supervision on a monthly basis to seventeen or more
persons who are or may be dependent upon the services of
others by reason of physical or mental impairment or who
may require limited and intermittent nursing care but who
are capable of self-preservation and are not bedfast.
Individuals may not be disqualified for residency solely
because they qualify for or receive services coordinated by
a licensed hospice. Each apartment in a residential care
community shall be at least three hundred square feet in
size, have doors capable of being locked and contain at
least: (1) One bedroom; (2) one kitchenette that includes
a sink and a refrigerator; and (3) one full bathroom that
includes a bathing area, toilet and sink. Services utilizing
equipment which requires auxiliary electrical power in the
event of a power failure may not be used unless the
residential care community has a backup power generator.
Nothing contained in this article applies to hospitals, as
defined under section one, article five-b of this chapter,
state institutions, as defined under section three, article
one, chapter twenty-five of this code or section six, article
one, chapter twenty-seven of this code, residential care
communities operated as continuing care retirement
communities or housing programs operated under rules of
the federal department of housing and urban development
and/or the office of rural economic development, residen-
tial care communities operated by the federal government
or the state government, institutions operated for the
treatment and care of alcoholic patients, offices of physi-
cians, hotels, boarding homes or other similar places that
furnish only room and board, or to homes or asylums
operated by fraternal orders pursuant to article three,
chapter thirty-five of this code;

(l) "Secretary" means the secretary of the state depart-
ment of health and human resources or his or her designee;
and

(m) "Substantial compliance" means a level of compli-
ance with the rules promulgated hereunder that identified
deficiencies pose a risk to resident health or safety no
greater than a potential for causing minimal harm.

The secretary may by rule define terms pertinent to this
article which are not defined herein.

§16-5N-3. Powers, duties and rights of director.

1. In the administration of this article, the director has the
   following powers, duties and rights:

   (a) To enforce rules and standards for residential care
       communities as adopted, proposed, amended or modified
       by the secretary;

   (b) To exercise all powers granted herein relating to the
       issuance, suspension and revocation of licenses of residen-
       tial care communities;

   (c) To enforce rules governing the qualification of
       applicants for residential care community licenses,
       including, but not limited to, educational, financial,
       personal and ethical requirements, as adopted, proposed,
       amended or modified by the secretary;

   (d) To receive and disburse federal funds and to take any
       lawful action that is necessary or appropriate to comply
       with the requirements and conditions for the receipt or
       expenditure of federal funds;

   (e) To receive and disburse funds appropriated by the
       Legislature to the division for any authorized purpose;

   (f) To receive and disburse funds obtained by the
       division by way of gift, grant, donation, bequest or devise,
       according to the terms thereof, funds derived from the
       division's operation, and funds from any other source, no
       matter how derived, for any authorized purpose;

   (g) To negotiate and enter into contracts, and to execute
       all instruments necessary or convenient in carrying out the
       functions and duties of the position of director; and all of
       these contracts, agreements and instruments shall be
       executed by the director;

   (h) To appoint officers, agents, employees and other
personnel and establish the duties and fix the compensation thereof;

(i) To offer and sponsor education and training programs for residential care communities' administrative, managerial and operations personnel;

(j) To undertake survey, research and planning projects and programs relating to the administration and operation of residential care communities and to the health, care, treatment and service in general of residents of these communities;

(k) To establish by legislative rule in accordance with section ten of this article and to assess reasonable civil penalties for violations of residential care community standards;

(l) To inspect any residential care community and any of the records maintained therein, subject to the provisions of section ten of this article;

(m) To establish legislative rules in accordance with article three, chapter twenty-nine-a of this code, setting forth procedures for implementing the provisions of this article, including informal conferences, investigations and hearings, and for enforcing compliance with the provisions of this article and the rules promulgated hereunder;

(n) To subpoena witnesses and documents, administer oaths and affirmations and examine witnesses. Upon the failure of any person without lawful excuse to obey a subpoena to give testimony and upon reasonable notice to all persons affected thereby, the director may apply to the circuit court of the county in which the hearing is to be held or to the circuit court of Kanawha County for an order compelling compliance;

(o) To make a complaint or cause proceedings to be instituted against any person or persons for the violation of the provisions of this article or of the rules promulgated hereunder. An action may be taken by the director in the absence of concurrence or participation by the prosecuting attorney of the county in which the proceedings are instituted. The circuit court of Kanawha County or the
circuit court of the county in which the violation has 
occurred has jurisdiction in any civil enforcement action 
brought pursuant to this article and may order equitable 
relief. In these cases, the court may not require that a 
bond be posted, nor may the director or any person acting 
under his or her authority be required to give security for 
costs;

(p) To delegate authority to his or her employees and 
agents in the performance of any power or duty granted in 
this article, except the issuance of final decisions in any 
adjudicatory matter; and

(g) To submit a report to the governor and the Legisla-
ture on or before the first day of December, one thousand 
nine hundred ninety-seven, and annually thereafter, which 
report shall review the residential care community 
licensing and investigatory activities of the division 
during the preceding year and the nature, scope and status 
of any other activities of the division. This report may 
include comment on the actions, policies, practices or 
procedures of any public or private agency that may affect 
the rights, health or welfare of residents of residential care 
communities. These annual reports shall also include a 
listing of all licensed residential care communities in the 
state together with the following information: Whether a 
community is proprietary or nonproprietary; how the 
community is or should be classified; the name of the 
owner or owners; the total number of apartments con-
tained therein; the monthly costs for residents; the number 
and profession of full-time employees; the number and 
types of recreational programs available to residents; and 
other services and programs available to residents, and the 
costs thereof; and whether the residential care community 
listed accepted medicare or medicaid residents. These 
reports shall also contain the division's recommendations 
with regard to changes in law or policy which it considers 
necessary or proper for the protection of the rights, health 
or welfare of the residents of residential care communities 
within the state.

§16-5N-4. Administrative and inspection staff.
The director may, at any time he or she considers necessary, employ administrative employees, inspectors or other persons to properly implement the provisions of this article. Employees of the division shall be members of the state civil service system and shall enforce the provisions of this article and the rules promulgated hereunder. In discharging their official duties, employees of the division have the right of entry into any place maintained as a residential care community.

§16-5N-5. Rules; minimum standards for residential care communities.

(a) The secretary shall, by the first day of July, one thousand nine hundred ninety-eight, propose all rules that may be necessary or proper to implement or effectuate the purposes and intent of this article and to enable the director to exercise the powers and perform the duties conferred herein. All rules authorized or required pursuant to this article shall be proposed by the secretary and promulgated in accordance with the provisions governing legislative rules, contained in article three, chapter twenty-nine-a of this code.

(b) The secretary shall propose rules establishing minimum standards for the operation of residential care communities, including, but not limited to, the following:

(1) Administrative policies, including: (i) An affirmative statement of the right of access to residential care communities by members of recognized community organizations and community legal services programs whose purposes include rendering assistance without charge to residents, consistent with the right of residents to privacy; and (ii) a statement of the rights and responsibilities of residents;

(2) Minimum numbers and qualifications of residential care community personnel according to the size, classification and health care needs of the residential care community;

(3) Safety requirements, except for those fire and life safety requirements under the jurisdiction of the state fire marshal;
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(4) Sanitation requirements;
(5) Protective and personal services required to be provided;
(6) Dietary services required to be provided;
(7) Maintenance of health records, including confidentiality;
(8) Social and recreational activities required to be made available;
(9) Physical facilities;
(10) Requirements related to limited and intermittent nursing care; and
(11) Other items or considerations that the secretary considers appropriate to ensure the health, safety and welfare of residents of residential care communities.

c) The secretary shall propose rules that include detailed specifications for each category of standards required under subsections (b) and (d) of this section, and shall classify these standards as follows:

(1) Class I standards, the violation of which presents either an imminent danger to the health, safety or welfare of a resident or a substantial probability that death or serious physical harm may result;
(2) Class II standards, the violation of which directly implicates the health, safety or welfare of a resident, but which does not present imminent danger thereto; and
(3) Class III standards, the violation of which has an indirect or potential impact on the health, safety or welfare of any resident.

d) A residential care community shall attain substantial compliance in every category of standard enumerated in this section in order to be considered as being in substantial compliance with the requirements of this article and the rules promulgated hereunder.

e) Until such time as the secretary proposes rules governing residential care communities under this section,
existing rules governing residential board and care homes shall apply to residential care communities and shall be construed so as to conform with the provisions of this article in their application to residential care communities: Provided, That to the extent any provisions of the rule governing residential board and care homes conflict with the provisions of this article, the provisions of this article shall govern.

§16-5N-6. License required; application; fees; duration; renewal.

No person may establish, operate, maintain, offer or advertise a residential care community within this state unless he or she first obtains a license therefor as provided in this article, which license remains unsuspended, unrevoked and unexpired. No public official or employee may place any person in, or recommend that any person be placed in, or directly or indirectly cause any person to be placed in, any residential care community which is being operated without a valid license from the director. The procedure for obtaining a license is as follows:

(a) The applicant shall submit an application to the director on a form prescribed by the director, containing information as may be necessary to show that the applicant is in compliance with the standards for residential care communities as established by this article and the rules promulgated hereunder. The application and any exhibits thereto shall provide the following information:

(1) The name and address of the applicant;

(2) The name, address and principal occupation: (i) Of each person who, as a stockholder or otherwise, has a proprietary interest of ten percent or more in the applicant; (ii) of each officer and director of a corporate applicant; (iii) of each trustee and beneficiary of an applicant which is a trust; and (iv) where a corporation has a proprietary interest of twenty-five percent or more in an applicant, the name, address and principal occupation of each officer and director of the corporation;

(3) The name and address of the owner of the premises
of the residential care community or proposed residential care community, if different from the applicant, and if so, the name and address: (i) Of each person who, as a stockholder or otherwise, has a proprietary interest of ten percent or more in the owner of the premises; (ii) of each officer and director of a corporate applicant; (iii) of each trustee and beneficiary of the owner if it is a trust; and (iv) where a corporation has a proprietary interest of twenty-five percent or more in the owner, the name and address of each officer and director of the corporation;

(4) Where the applicant is the lessee or the assignee of the residential care community or the premises of the proposed residential care community, a signed copy of the lease and any assignment thereof;

(5) The name and address of the residential care community or the premises of the proposed residential care community;

(6) The proposed number of apartments in the residential care community;

(7) (A) An organizational plan for the residential care community indicating the number of persons employed or to be employed, and the positions and duties of all employees; (B) the name and address of the individual who is to serve as administrator; and (C) evidence of compliance with applicable laws and rules governing zoning, building, safety, fire prevention and sanitation, as the director may require; and

(8) Additional information as the director may require.

(b) Upon receipt and review of an application for license made pursuant to subdivision (a) of this section and inspection of the applicant pursuant to section ten of this article, the director shall issue a license if he or she finds:

(1) That an applicant which is an individual and every partner, trustee, officer, director and person with a controlling interest of an applicant which is not an individual, is a person responsible and suitable to operate or to direct or participate in the operation of a residential care community by virtue of financial capacity, appropri-
ate business or professional experience, a record of
compliance with lawful orders of the department (if any)
and a history of nonrevocation of a license during the five
years immediately preceding the application;

(2) That the residential care community is under the
supervision of an administrator qualified for that position
by training and experience;

(3) That the residential care community is in substantial
compliance with standards established pursuant to section
five of this article, and other requirements as the secretary
may establish by rule under this article.

Any license granted by the director shall state the
maximum number of apartments for which it is granted,
the date of issuance and the date of expiration. Residential
care community licenses shall be issued for a period
not to exceed one year: Provided, That any license which
is unexpired, for which timely application for renewal has
been made, together with payment of the proper fee, as
required by the provisions of this article and the rules
promulgated hereunder, continues in effect until: (i) One
year after the original expiration date of the license; (ii)
the date that the license is revoked or suspended pursuant
to the provisions of this article; or (iii) the date of issuance
of a new license, whichever date first occurs. Each license
issued is only for the premises and applicant named in the
application and may not be transferred or assigned:
Provided, however, That if the ownership of a residential
care community with an unexpired license is transferred,
the filing of an application for a license with the director
by the new owner shall have the effect of licensing the
operation of the residential care community under the new
owner for a period not to exceed three months. Every
residential care community license shall be displayed in a
conspicuous place at the facility for which it is issued so
as to be accessible to and in plain view of residents and
visitors.

(c) An original license may be renewed upon the timely
filing of an application therefor, accompanied by the
required fee and contingent upon the licensee's submission
of evidence satisfactorily demonstrating compliance with the provisions of this article and the rules promulgated hereunder together with the following:

(1) A balance sheet as of the end of the residential care community's fiscal year, setting forth its assets and liabilities as of that date, including all capital, surplus, reserve, depreciation and similar accounts;

(2) A statement of operations of the residential care community as of the end of its fiscal year, setting forth all revenues, expenses, taxes, extraordinary items and other credits or charges; and

(3) A statement of any changes in the name, address, management or ownership information on file with the director.

(d) In the case of an application for license renewal, if all the requirements of section five of this article are not met, the director may issue a provisional license, provided that care given in the residential care community is adequate for resident needs and the residential care community has demonstrated improvement and evidences potential for substantial compliance during the term of the provisional license: Provided, That a provisional license is effective for a period not to exceed one year, may not be renewed, and may not be issued to any residential care community with uncorrected violations of any Class I standard, as defined in subsection (c), section five of this article.

(e) A nonrefundable application fee in the amount of sixty-five dollars for an original residential care community license shall be paid at the time an application for license is made. The average cost of all direct costs for initial licensure inspections of all residential care communities for the preceding year shall be assessed against and paid by the applicant to the director before an initial or amended license may be issued. The fee for license renewal shall be computed at the rate of four dollars per apartment in the community per year: Provided, That the rate per apartment may be assessed against applicants for whom a license is issued for a period of less than one year. The director may annually adjust licensure fees for
inflation, based upon the consumer price index. All license fees are due and payable to the director, annually, in the manner set forth in the rules promulgated hereunder. The director shall retain each application and licensure fee pending final action on the application. All fees received by the director under the provisions of this article shall be deposited in accordance with section thirteen, article one of this chapter.

§16-5N-7. Cost disclosure; residents' funds; nursing care; fire code.

(a) Each residential care community shall disclose in writing to all prospective residents a complete and accurate list of all costs which may be incurred by them as residents of the community. Residents may not be held liable for any cost that was not disclosed.

(b) Residential care communities may not manage the personal finances or funds of its residents.

(c) A residential care community may be required to have registered nurses on its staff to the extent that it provides limited and intermittent nursing care.

(d) Residential care communities shall comply with the applicable provisions of the current edition of the life safety code as promulgated by the national fire protection association and adopted by the state fire commission.

§16-5N-8. Investigation of complaints.

The secretary shall by rule establish procedures for the prompt investigation of all complaints of alleged violations of applicable requirements of state law or rules by residential care communities, except those complaints that the director determines are without any reasonable basis or are made with the sole intention to willfully harass a licensee. These procedures shall include provisions for ensuring the confidentiality of the complainant and of any other person named in the complaint, and for promptly informing the complainant and the residential care community involved of the results of the investigation.

If, after its investigation, the director determines that
If the complaint has merit, the director shall take appropriate disciplinary action and shall advise any injured party of the possibility of a civil remedy under this article.

No residential care community may discharge or in any manner discriminate or retaliate against any employee or resident for filing a complaint or participating in any proceeding provided for in this article. Violation of this prohibition by any residential care community constitutes grounds for the suspension or revocation of its license as provided in section eleven of this article. Any type of adverse action taken by a residential care community against a resident who has submitted a complaint to the director or upon whose behalf a complaint has been submitted or who has instituted any proceeding under this article, if taken within one hundred twenty days of the filing of the complaint or the institution of the proceeding, shall raise a rebuttable presumption that the adverse action was taken in retaliation for filing the complaint or instituting the proceeding.

§16-5N-9. Inspections.

The director and any duly designated employee or agent thereof is authorized to enter upon and into the premises of any residential care community for which a license has been issued, for which an application for license has been filed, or of which the director has reason to believe is being operated or maintained as a residential care community without a license. If entry is refused by the owner or person in charge of the residential care community, the director shall apply to the circuit court of the county in which the residential care community is located or the circuit court of Kanawha County for an order authorizing inspection, and the court shall issue an appropriate order if it finds good cause for inspection.

The director, by and through his or her agents or employees, shall conduct at least one inspection of a residential care community before issuing a license to it and shall conduct periodic unannounced inspections thereafter to determine if it is in compliance with all applicable statutory requirements and rules. All residential care commu-
nities shall comply with applicable rules of the state fire
commission. The state fire marshal, by and through his or
her agents or employees, shall make all fire, safety and
similar inspections of residential care communities. The
director may provide for other inspections he or she
considers necessary to effectuate the intent and purpose of
this article. If the director determines upon investigation
that a complaint is substantiated and that an immediate
and serious threat to health or safety exists at a residential
care community, he or she may invoke any remedy avail-
able pursuant to section eleven of this article. Any
residential care community aggrieved by a determination
or assessment made pursuant to this section shall have the
right to an administrative appeal as set forth in section
twelve of this article.

§16-5N-10. Reports of inspections; plans of correction; assess­
ment of penalties, fees and costs; use of funds
derived therefrom; hearings.

(a) Reports of all inspections made pursuant to section
nine of this article shall be in writing and filed with the
director, and shall list all deficiencies in the residential
care community's compliance with the provisions of this
article and the rules promulgated hereunder. The director
shall send a copy of the report to the residential care
community and shall specify a time within which the
residential care community shall submit a plan for
correction of any listed deficiencies, which plan shall be
approved, rejected or modified by the director. Inspectors
shall allow audio taping of the exit conference that
follows a licensure or certification inspection, with all
costs incurred as a result of the taping to be paid by the
residential care community. A copy of the audio tape
shall be provided to the inspector.

(b) Upon the failure of a residential care community to
submit a plan of correction as required or to correct any
deficiency within the time specified, the director may
assess a civil penalty or initiate other appropriate legal or
disciplinary action, as provided by this article.

(c) Nothing in this section may be construed to require
the director to afford a formal opportunity for a residential care community to correct a deficiency before initiating an enforcement action in either an administrative or judicial forum, where, in the opinion of the director, the deficiency jeopardizes the health or safety of the community's residents or where the deficiency is the second or subsequent violation to occur within a twelve-month period.

(d) Civil penalties assessed against residential care communities shall be classified according to the nature of the violation, as provided in subsection (c), section five of this article and rules promulgated thereunder, consistent with the following: For each violation of a Class I standard, the civil penalty imposed shall be not less than fifty nor more than five hundred dollars; for each violation of a Class II standard, the civil penalty imposed shall be not less than twenty-five nor more than fifty dollars; for each violation of a Class III standard, the civil penalty imposed shall be not less than ten nor more than twenty-five dollars. Each day that a violation continues after the date of citation constitutes a separate violation. The date of the citation is the date the facility receives the written statement of deficiencies.

(e) The director shall assess a civil penalty not to exceed two thousand dollars against any individual who notifies a residential care community, or causes it to be notified, in advance, of the time or date on which an inspection is scheduled to be conducted under this article.

(f) If the director assesses a penalty under this section, he or she shall cause a notice of penalty to be delivered to the residential care community by personal service or by certified mail. This notice shall state the amount of the penalty, the action, deficiency or other circumstance for which the penalty is assessed, the statutory requirement or rule which has been violated and the basis upon which the director determined the amount of the penalty.

(g) The director shall recover in a judicial proceeding any civil penalty which: (i) Remains uncontested and unpaid for thirty days after its receipt; or (ii) if contested,
has been affirmed by the director and remains unappealed for thirty days after receipt of the director's final order; or (iii) if appealed, has been affirmed upon judicial review of the director's final order. All funds received in the form of civil penalties or interest thereon pursuant to this article shall be deposited in a special resident benefit account which is hereby established and applied by the director exclusively for the protection of the health or property of residents of residential care communities operated within this state that the director determines to be deficient, which may include payment of costs to relocate residents of a deficient residential care community to other facilities, operation costs of a residential care community pending correction of deficiencies or closure and reimbursement of residents for personal funds lost.

(h) The opportunity for a hearing on any action taken under this section is as provided in section twelve of this article. In addition to any other rights of appeal conferred upon a residential care community under this section, it may also request a hearing and seek judicial review pursuant to sections twelve and thirteen of this article to contest the director's citing of a deficiency in an inspection report, irrespective of whether the deficiency results in the imposition of a civil penalty.

§16-5N-11. License limitation, suspension and revocation; ban on admissions; continuation of disciplinary proceedings; closure, transfer of residents, appointment of temporary management; assessment of interest; collection of assessments; hearing.

(a) The director shall by order impose a ban on the admission of additional residents or reduce the number of apartments permitted in a residential care community, or any combination thereof, where it is determined upon inspection that a licensee is not providing adequate care to its residents under its existing quota and, further, that a reduction in the quota or the imposition of a ban on additional admissions, or a combination thereof, would enable the licensee to render adequate care to its residents. A notice to a licensee of a reduction in its quota or a ban
on additional admissions shall include the terms of the order, the reasons therefor, and the date by which it must comply.

(b) The director may suspend or revoke a license issued under this article if it is determined upon inspection that there has been a substantial failure to comply with the provisions of this article or the standards or rules promulgated hereunder.

(c) Whenever a license is limited, suspended or revoked pursuant to this section, the director shall file an administrative complaint stating facts constituting the grounds therefor. Upon the filing of this administrative complaint, the director shall notify the licensee in writing, enclose a copy of the administrative complaint, and advise the licensee of its opportunity for a hearing pursuant to section twelve of this article. The notice and copy of the administrative complaint shall be served on the licensee by certified mail, return receipt requested.

(d) The suspension, revocation or expiration of a license, or the withdrawal of an application for a license after it has been filed with the director, may not deprive the director of his or her authority to institute or continue a disciplinary proceeding or to deny an application for a license.

(e) In addition to other remedies provided in this article, upon petition from the director, a circuit court may determine that a residential care community's deficiencies under this article constitute an emergency immediately jeopardizing the health, safety, welfare or rights of its residents, and issue an order to:

(1) Close the residential care community;

(2) Transfer residents of the residential care community to other facilities; or

(3) Appoint a temporary manager to oversee the operation of the residential care community and to assure the health, safety, welfare and rights of the residential care community's residents, where there is a need for temporary management while:
(A) There is an orderly closure of the residential care community; or

(B) Corrections are made in order to bring the residential care community into compliance with all applicable requirements of this article and the rules promulgated hereunder.

If the director petitions a circuit court for the closure of a residential care community, for the transfer of residents, or for the appointment of a temporary manager, the circuit court shall hold a hearing no later than seven days thereafter, at which time the director and the licensee or operator of the residential care community may participate and present evidence.

A circuit court may divest the licensee or operator of possession and control of a residential care community in favor of temporary management. The temporary management is accountable to the court and has those powers and duties that the court may grant to direct all acts necessary or appropriate to conserve the property and promote the health, safety, welfare and rights of the residents, including, but not limited to, replacing managerial and other staff, hiring consultants, making necessary expenditures to close the residential care community or to repair or improve the residential care community so as to return it to compliance with applicable requirements, and receiving, conserving and expending funds, including making payments on behalf of the licensee or operator. Priority in making payments shall be given to expenditures for current direct resident care and the transfer of residents, if necessary.

The person charged with temporary management shall be an officer of the court and paid by the residential care community if resources are available; he or she may not be held liable in any capacity for conditions at the residential care community that originated or existed before his or her appointment nor may he or she be held personally liable for any act or omission, except those constituting gross negligence or intentional acts that result in injuries to persons or damage to property during his or her tenure.
as temporary manager.

It is unlawful for any person to impede the operation of temporary management as appointed by the court. For ninety days after the appointment of temporary management at a residential care community, any legal action that would interfere with its functioning or operation shall be automatically stayed. These actions include, but are not limited to, cancellation of insurance policies, termination of utility services, attachments to working capital accounts, foreclosures, evictions and repossessions of equipment used in the residential care community.

Temporary management appointed by the court for purposes of making improvements to bring a residential care community into compliance with applicable requirements may not be terminated until the court has determined that the residential care community has the management capability to ensure continued compliance with all applicable requirements: Provided, That if the court does not make such a determination within six months of the appointment of the temporary management, the temporary management terminates by operation of law at that time, and the residential care community shall be closed. After the termination of the temporary management, the person who was appointed as the temporary management shall make an accounting to the court, and after deducting the costs of the temporary management, expenditures and civil penalties and interest no longer subject to appeal, in that order, from receipts, the remainder, if any, shall be paid to the licensee or operator of the residential care community.

(f) Assessments for civil penalties and costs of actions taken under this article, including attorney fees, shall accrue interest at the rate of five percent per annum, beginning on the thirtieth day after receipt of notice of the assessment or the thirtieth day after receipt of the director’s final order following a hearing, whichever later occurs. All assessments against a residential care community that remain unpaid shall be added to its licensure fee next due and may be filed as a lien against the property of the licensee or operator of the residential care community.
Funds received from these assessments shall be deposited in the same manner as are funds received pursuant to section ten of this article.

(g) The secretary is authorized to propose emergency rules, if necessary, to expand the powers of the director beyond those provided in this article, to the extent required to comply with federal requirements: Provided, That the director's powers may be expanded only to the extent required by federal requirements. Emergency rules proposed pursuant to this subsection are subject to the provisions governing legislative rules contained in article three, chapter twenty-nine-a of this code.

(h) The opportunity for a hearing on any action taken by the director under this section is as provided in section twelve of this article.

§16-5N-12. Administrative appeals from civil penalty assessment, license limitation, suspension or revocation.

(a) Any licensee or applicant aggrieved by an order issued pursuant to section five, six, ten or eleven of this article shall, upon timely written request, be afforded an opportunity for a hearing by the director at which the order may be contested as contrary to law, unwarranted by the facts, or both. The provisions of article five, chapter twenty-nine-a of this code governing contested cases apply to and govern hearings conducted pursuant to this section and the administrative procedures in connection therewith. A licensee or applicant may also request an informal meeting with the director before requesting a hearing.

After a hearing conducted pursuant to this section, the director shall make and enter a written order either dismissing the complaint or taking whatever action is authorized and appropriate pursuant to this article. This written order shall be served upon the licensee and his or her attorney of record, if any, by certified mail, return receipt requested, accompanied by the director's findings of fact and conclusions of law as specified in section three, article five, chapter twenty-nine-a of this code. If the
director suspends a residential care community's license, the order directing the suspension shall specify the grounds for the suspension and the time by which the conditions or circumstances giving rise to the suspension must be corrected in order for the licensee to be entitled to reinstatement of its license. If the director revokes a license, he or she may stay the effective date of the revocation upon a showing that a delay is necessary to assure appropriate placement of the licensee's residents: Provided, That the effective date of revocation may not be stayed for more than ninety days. The director's order is final unless it is vacated, reversed or modified by the court upon judicial review in accordance with the provisions of section thirteen of this article.

(b) In addition to all other powers granted by this chapter, the director may take a case under advisement and make a recommendation as to requirements to be met by a licensee in order to avoid suspension or revocation of its license. In these cases, the director shall enter an appropriate order and notify the licensee and its attorney of record, if any, by certified mail, return receipt requested. If the licensee meets the requirements of this order, the director shall enter a subsequent order taking notice of the licensee's satisfactory compliance and dismissing the complaint. This order shall also be delivered to the licensee and its attorney of record, if any, by certified mail, return receipt requested.


Any licensee adversely affected by an order of the director rendered after a hearing held in accordance with the provisions of section twelve of this article is entitled to judicial review thereof. All of the pertinent provisions of section four, article five, chapter twenty-nine-a of this code apply to and govern these proceedings with like effect as if those provisions were set forth in extenso herein.

The judgment of the circuit court is final unless reversed, vacated or modified on appeal to the supreme court of appeals in accordance with the provisions of
§16-5N-14. Legal counsel and services for the director.

(a) Legal counsel and legal services for the director in all administrative hearings and all proceedings in any circuit court and the supreme court of appeals shall be provided by the attorney general or his or her assistants, an attorney employed by the director or, in proceedings in any circuit court, by the prosecuting attorney of the county wherein the action is instituted, all without additional compensation.

(b) The governor may appoint counsel for the director, who shall perform legal services in representing the interests of residents in residential care communities in matters under the jurisdiction of the director, as the governor shall direct. It is the duty of counsel so appointed to appear for the residents in all cases where they are not represented by counsel. The compensation of counsel so appointed shall be fixed by the governor.

§16-5N-15. Unlawful acts; penalties; injunctions; private right of action.

(a) Whoever advertises, announces, establishes or maintains, or is engaged in establishing or maintaining a residential care community without a license granted under section six of this article, or who prevents, interferes with or impedes in any way the lawful enforcement of this article is guilty of a misdemeanor and, upon conviction thereof, shall be punished for the first offense by a fine of not more than one hundred dollars, or by confinement in the regional or county jail for a period of not more than ninety days, or both, in the discretion of the court. For a second or subsequent offense, the fine may be increased to not more than two hundred fifty dollars, with confinement in the regional or county jail for a period of not more than ninety days, or both, in the discretion of the court. Each day that a violation continues after conviction therefor constitutes a separate offense.

(b) The director may bring an action to enforce compliance with this article, any rule promulgated hereunder, or
order issued hereunder, whenever it appears to the
director that a person has engaged in or is engaging in an
act or practice in violation of this article or any rule or
order hereunder, or whenever it appears to the director
that a person has aided, abetted or caused, or is aiding,
abetting or causing such an act or practice. Upon applica-
tion by the director, the circuit court of the county in
which the conduct has occurred or is occurring has
jurisdiction to grant without bond a permanent or tempo-
rary injunction, decree or restraining order.

Whenever the director has refused to grant or renew a
license, revoked a license that is required to operate a
residential care community, or ordered a person to refrain
from actions that violate the rules promulgated pursuant
to this article, and the person has appealed the action of
the director, the court may, during the pendency of the
appeal, issue a restraining order or injunction upon proof
that the operation of the residential care community or its
failure to comply with the order of the director adversely
affects the well-being or safety of the residents of the
residential care community. Should a person who appeals
an order of the director fail to appear or should the appeal
be decided in favor of the director, the court shall issue a
permanent injunction upon proof that the person is
operating or conducting a residential care community
without a license as required by law, or has continued to
violate the rules promulgated pursuant to this article.

(c) Any residential care community that deprives a
resident of any right or benefit created or established for
the well-being of the resident by the terms of any contract,
any state statute or rule, or by any applicable federal
statute or regulation, is liable to that resident in a civil
action for any injuries suffered as a result of the depriva-
tion. Upon a finding that a resident has been deprived of
a right or benefit and suffered an injury thereby, compen-
satory damages shall be assessed in an amount sufficient
to compensate the resident for the injury, unless there is a
finding that the residential care community exercised due
care reasonably necessary to prevent and limit the depri-
vation and injury to the resident. In addition, if the
deprivation by a residential care community of a right or
benefit is found to have been willful or in reckless disre-
gard, punitive damages may be assessed. A resident may
also maintain an action pursuant to this section for any
other type of relief, including injunctive and declaratory
relief, permitted by law. Exhaustion of available adminis-
trative remedies may not be required prior to commencing
an action hereunder.

The amount of damages recovered by a resident in an
action brought pursuant to this section is exempt for
purposes of determining initial or continuing eligibility
for medical assistance under article four, chapter nine of
this code, and may not be taken into consideration or
required to be applied toward the payment or part pay-
ment of the cost of medical care or services available
under that article.

Any waiver by a resident or his or her legal representa-
tive of the right to commence an action under this section,
whether oral or in writing, is null and void as contrary to
public policy.

(d) The penalties and remedies provided in this section
are cumulative and are in addition to all other penalties
and remedies provided by law.

§16-5N-16. Availability of reports and records.

The director shall make available for public inspection
and provide copies at a nominal cost of all inspection
reports and other reports of residential care communities
filed with or issued by the director. Nothing contained in
this section may be construed to allow the public disclo-
sure of confidential medical, social, personal or financial
records of any resident. The secretary shall adopt rules
that are reasonably necessary to effectuate the provisions
of this section and preserve the confidentiality of medical,
social, personal or financial records of residents.
That Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Chairman Senate Committee

Chairman House Committee

Originated in the Senate.
In effect ninety days from passage.

Clerk of the Senate

Clerk of the House of Delegates

President of the Senate

Speaker House of Delegates

The within approved this the day of , 1997.

Governor